ORIGINAL

No. 00-8452

FILED

MAR 8 2001

CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

RECEIVED

JAN 16 2002

LDC

DARYL RENARD ATKINS,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Petition for a Writ of Certiorari to the
Supreme Court of Virginia

COMMONWEALTH'S BRIEF IN OPPOSITION

MARK L. EARLEY
Attorney General of Virginia

PAMELA A. RUMPZ
Assistant Attorney General
Counsel of Record

Office of the Attorney General
900 East Main Street
Richmond, Virginia 23219
(804)786-4624

Counsel for Respondent

RECEIVED
MAR 12 2001
OFFICE OF THE CLERK

16 pp

QUESTION PRESENTED

Should certiorari be granted to review whether the Virginia Supreme Court correctly disallowed the hearsay testimony of a police officer about Atkins' pretrial statement in the penalty phase of Atkins' trial?

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES i

STATEMENT OF THE CASE 1

STATEMENT OF FACTS 1

REASONS FOR DENYING THE WRIT 7

ATKINS' CLAIM THAT HE WAS DENIED HIS RIGHT TO PRESENT MITIGATION EVIDENCE IN VIOLATION OF THE EIGHTH AMENDMENT IS, IN REALITY, A SIMPLE STATE LAW ISSUE AND IS WITHOUT MERIT IN ANY EVENT 7

A. State law issue 7

B. No merit 9

CONCLUSION 10

TABLE OF AUTHORITIES

Cases

Page

Atkins v. Commonwealth,
257 Va. 160, 510 S.E.2d 445 (1999) 1, 5

Atkins v. Commonwealth,
260 Va. 375, 534 S.E.2d 312 (2000) 1, 7

Chambers v. Mississippi,
410 U.S. 284 (1973) 8

Delaware v. Van Arsdall,
475 U.S. 673 (1986) 8

Franklin v. Lynaugh,
487 U.S. 164 (1988) 9

Green v. Georgia,
442 U.S. 95 (1979) 9

Herb v. Pitcairn,
324 U.S. 117 (1945) 8

Maretta v. Commonwealth,
231 Va. 128, 340 S.E.2d 828 (1986) 8

Michigan v. Long,
463 U.S. 1032 (1983) 8

Romano v. Oklahoma,
512 U.S. 1 (1994) 8

Spencer v. Texas,
385 U.S. 554 (1967) 8

Other Authority

Charles E. Friend, The Law of Evidence in Virginia,
§ 18-4, 102 (4th ed. 1993) 8

STATEMENT OF THE CASE

On February 13, 1998, a jury in the Circuit Court of York County convicted the petitioner, Daryl Renard Atkins, of capital murder of Eric Nesbitt and use of a firearm in the commission of murder. The jury fixed Atkins' punishment at five years on the firearm conviction. The jury also sentenced Atkins to death on the capital murder conviction. On direct appeal, the Virginia Supreme Court affirmed Atkins' convictions but reversed his death sentence, concluding that an improper sentencing verdict form required a remand to the trial court for resentencing. Atkins v. Commonwealth, 257 Va. 160, 510 S.E.2d 445 (1999) (Atkins I).

A new sentencing hearing was held on August 17-19, 1999. At the conclusion of this hearing, the jury sentenced Atkins to death on the capital murder conviction, finding that he represented a continuing serious threat to society and that his offense was outrageously or wantonly vile, horrible or inhuman in that it involved aggravated battery to the victim. In a post-verdict sentencing hearing held October 26, 1999, the trial judge imposed sentence in accordance with the jury's verdict. On appeal after resentencing, the Virginia Supreme Court affirmed Atkins' death sentence. Atkins v. Commonwealth, 260 Va. 375, 534 S.E.2d 312 (2000) (Atkins II).

STATEMENT OF FACTS

Guilt Phase

The following facts are taken from the Virginia Supreme Court's opinion in Atkins I:

> On the afternoon of August 16, 1996, William A. Jones and Atkins were "drinking and smoking weed" at the home Atkins shared with his father. During the course of that afternoon, "[a] couple of [Atkins'] friends came by, in and out." On several occasions during the afternoon and later that evening, those present pooled their money, and Atkins and Jones walked to a nearby convenience

store to buy beer or were driven by one of Atkins' friends to an ABC store to buy liquor.

That evening between 10:30 and 11:00 p.m., a friend of Atkins, known to Jones only as "Mark," arrived at the home. Mark had brought a handgun with him and gave it to Atkins after Atkins said "that he wanted to use it, he would bring it back in the morning." A short time later, Atkins and Jones again walked to the convenience store to buy beer. Atkins told Jones that he did not have enough money and was going to "panhandle and get some change up." Atkins had the handgun he had borrowed from Mark tucked behind the waistband of his pants, partially concealed by his belt buckle.

While Jones waited, Atkins approached several people to ask for money and collected some from one or two. Nesbitt, who was a stranger to Atkins, arrived at the store in his truck at approximately 11:30 p.m. After a brief conversation with Atkins, Nesbitt went into the store. When Nesbitt returned to his truck and was preparing to leave the parking lot, Atkins "whistled" at him and Nesbitt stopped his truck.

Atkins went to the passenger's side of the truck and Jones went to the driver's side. Atkins then pointed the handgun at Nesbitt and ordered Nesbitt to "[m]ove over, let my friend drive." Jones entered the truck from the driver's side and Atkins entered from the passenger's side.

As Jones drove the truck away from the convenience store, Atkins demanded that Nesbitt surrender his wallet. Atkins removed $60 from the wallet and was returning it to Nesbitt when he noticed a bankcard inside the wallet. On Atkins' instruction, Jones drove to a branch of Crestar Bank where Atkins forced Nesbitt to withdraw $200 using the bankcard from the bank's drive-through automatic teller machine. The security camera in this automatic teller machine recorded the truck arriving at the bank shortly after midnight on August 17, 1996. The videotape produced by the camera showed that Jones was driving, Atkins was in the passenger seat, and Nesbitt was between them. Nesbitt had to lean across Jones in order to operate the machine. During this entire time, Atkins kept the handgun pointed at Nesbitt.

Jones then drove to the parking lot of a nearby school where he and Atkins discussed what they should do with Nesbitt. Jones urged Atkins to "just tie him up so we can get away." Atkins told Jones he knew of a place near his grandfather's house in Yorktown

where they could leave Nesbitt and directed Jones to drive toward Yorktown on Interstate 64. Nesbitt asked them "just don't hurt me" and made no attempt to escape.

Upon arriving in a secluded area of York County off the Lee Hall exit of Interstate 64, Atkins exited the truck and ordered Nesbitt to do the same. "Nesbitt stepped out of the vehicle and probably took two steps" when Atkins began shooting him. Jones attempted to exit the truck because he feared that some of the shots were "coming in the truck." Unable to open the driver's side door, Jones rolled down the driver's side window and "jumped" out of the truck.

Jones began to struggle with Atkins for the handgun and Atkins was shot in the leg during that struggle. After Jones obtained the handgun, he drove Atkins to the emergency room of a local hospital, leaving Nesbitt's dead body at the scene of the shooting. Outside the emergency room, Jones asked Atkins for some of the money that had been taken from Nesbitt and then drove away alone in Nesbitt's truck.

After leaving Atkins at the emergency room, Jones drove to a motel in Newport News where he abandoned Nesbitt's truck. Jones spent the next several days moving from motel to motel. He cut his hair in an attempt to disguise his appearance. Jones subsequently returned to the first motel, where police, who previously had discovered the abandoned truck at the motel and were maintaining a surveillance of the area, arrested him. The handgun was not found in the truck and was never recovered.

Garland S. Clay discovered Nesbitt's body at the crime scene sometime after 3:45 a.m. on August 17, 1996 and contacted police. Investigator Frederick T. Lyons, a member of the major crimes section of the York County Sheriff's Office, arrived at the crime scene at 5:15 a.m.

Lyons discovered six shell casings near Nesbitt's body. After determining that Nesbitt had an account at Crestar Bank, Lyons learned that two withdrawals from the account had been made at Crestar automatic teller machines the previous night, one for $60 and one for $200. Lyons obtained still photographs and the videotapes from the automatic teller machines' security cameras and distributed copies to local police and media.

After the media broadcast the photographs, several callers to a "crime line phone number" identified Jones as the driver of

BEST AVAILABLE COPY

Nesbitt's truck. One caller told police that "a person that Mr. Jones runs with was a Daryl Atkins." Based upon these identifications, Lyons obtained an arrest warrant for Jones. After interviewing Jones' father and the father's girlfriend, Lyons "learned that Mr. Atkins was with William Jones," and obtained Atkins' address. Finding Atkins at home, Lyons was able to identify Atkins from the security camera photographs and placed him under arrest.

Dr. Leah L. E. Bush, an Assistant Chief Medical Examiner for the Commonwealth, performed an autopsy on Nesbitt's body. This autopsy revealed that Nesbitt had sustained eight separate gunshot wounds to the thorax, chest, abdomen, arms and legs. Several of the bullets exited and reentered the body. Three of the gunshot wounds were lethal. However, Nesbitt could have lived for several minutes before "the bleeding was to the point where his blood pressure would not support consciousness and life." Three bullets were recovered during the autopsy.

Additional forensic evidence showed that the six shell casings recovered from the crime scene had all been fired from the same weapon, as were the three bullets recovered from Nesbitt's body, a bullet recovered from Nesbitt's truck, and a bullet recovered from Atkins' leg. Bloodstains found on the passenger seat and interior passenger side door of Nesbitt's truck were identified as consistent with either Nesbitt's or Atkins' blood types. None of the tested samples was identified as likely to have come from another source.

Subsequent to his arrest and prior to his trial, while an inmate in the York County jail, Atkins shared a cell with Stephen R. Burton. According to Burton, Atkins told him "[t]hat he had put a boy out of a truck in York County, that he had shot at a boy to scare him." Atkins told Burton that he was not worried about being convicted because the police "wouldn't find the weapon . . . they didn't have the weapon, the only thing they had on him was a picture holding a gun to a boy" at the automatic teller machine. Atkins also told Burton that he had shot himself in the leg, but that he could not remember it because he was "too messed up" on drugs and alcohol to realize it.

Atkins testified on his own behalf and was the only defense witness on the issue of guilt. Atkins' account of the robbery and murder was in direct conflict with that of Jones. According to Atkins, he and Jones had gone to the convenience store with the intent to rob someone, and it was Jones who was armed and who initiated the contact with Nesbitt. Atkins maintained that Jones forced his way into Nesbitt's truck, and then gave the handgun to

> Atkins so that Jones could drive. Atkins admitted taking money from Nesbitt's wallet and forcing Nesbitt to withdraw money from the automatic teller machine.
>
> Atkins further maintained that Jones said "he know *[(sic)]* a place and he never told me" where they could take Nesbitt and "tie him up." After leaving the interstate, according to Atkins, Jones stopped the truck, took the handgun back from Atkins, placed it in a holster on his belt, and directed Atkins and Nesbitt to change places so that Nesbitt was sitting by the passenger door. Jones then drove "a little more" and then exited the truck and ordered Nesbitt to get out of the truck as well. With regard to the critical issue of who was the "triggerman" in the murder of Nesbitt, Atkins maintained that Jones shot Nesbitt several times and that one of the shots struck Atkins in the leg.
>
> The jury was instructed and heard closing arguments from counsel. After its deliberations, the jury returned verdicts convicting Atkins of capital murder and the associated firearm crime.

Atkins I, 257 Va. at 165-169, 510 S.E.2d 449, 451 (1999) (footnote omitted).

Penalty Phase

At resentencing, on the issue of vileness, the Commonwealth presented the testimony of Dr. Leah Bush. She testified that Nesbitt sustained eight separate gunshot wounds to the thorax, chest, abdominal area and to the arms and legs. Many of the bullets, however, had exited and then reentered Nesbitt's body, resulting in eighteen distinct bullet wounds. Three of the gunshots perforated Nesbitt's lungs, heart and aorta, caused massive internal hemorrhaging, and were "lethal." Bush testified that Nesbitt's injuries were painful and not immediately lethal. In fact, Nesbitt could have lived several minutes before dying.

To prove future dangerousness the Commonwealth introduced sentencing orders which reflected that Atkins previously had been convicted of five counts of robbery, maiming, grand larceny, breaking and entering, abduction and eight counts of use of a firearm in the commission of a felony. Dennis Tuninei, Shane Stoops and John Hultquist testified that they were robbed at

gunpoint by Atkins in April of 1996 as they were using a pay phone. In addition, Tuninei testified that during the robbery Atkins had hit him over the head with a broken bottle.

Kevin Phillips then testified that he worked as a pizza delivery man in June of 1996. As he was delivering a pizza to a house on Sacramento Street in Hampton, he was approached by three men who put a gun to his head, forced him to crawl to his car and drove him to a swamp. On the drive to the swamp, his captors debated whether to kill him. Once at the swamp he was told to "lay on the ground...and the gun was put in [his] back." Phillips was then told to get up and that he "had five seconds to run" before he was killed. Phillips started crawling through the swamp and his captors drove away. Atkins was charged and convicted of abduction, use of a firearm and robbery arising out of this incident.

Finally, Amanda Hamlin testified that she was the victim with respect to Atkins' 1996 maiming conviction. Hamlin testified that, as she was outside one evening mowing her yard, Atkins "slapped a gun up against [her] head." Atkins dragged her off her lawnmower, hit her again with the gun and then "put the gun and to [her] stomach and shot [her]." As a result of this unprovoked assault, Hamlin was hospitalized for twenty-one days.

As purported mitigation, Atkins introduced the testimony of a psychologist that Atkins was mildly mentally retarded and that in a structured prison setting away from alcohol and drugs, Atkins' risk for future violent behavior could decrease. In rebuttal, however, the Commonwealth's appointed psychologist testified that Atkins was of average intelligence and was not mentally retarded.

REASONS FOR DENYING THE WRIT

ATKINS' CLAIM THAT HE WAS DENIED HIS RIGHT TO PRESENT MITIGATING EVIDENCE IN VIOLATION OF THE EIGHTH AMENDMENT IS, IN REALITY, A SIMPLE STATE LAW ISSUE AND IS WITHOUT MERIT IN ANY EVENT.

Prior to trial, Atkins gave a statement to Detective Troy Lyons in which he admitted abducting the victim by gunpoint and forcing him, also at gunpoint, to withdraw $200 from an automated teller machine of a local bank. In this statement, Atkins, however, adamantly denied murdering the victim and squarely placed the blame for the murder on his co-defendant. At trial, the court disallowed testimony from Lyons about this statement. On direct appeal, the Virginia Supreme Court affirmed the trial court's decision to exclude Lyons' testimony holding that it was clear hearsay and that "no exception to the hearsay rule applied which would allow Lyons to testify about the content of Atkins' statement." Atkins II, 260 Va. at 381, 534 S.E.2d at 315.

Atkins asserts that this Court should grant certiorari because the decision of the Virginia Supreme Court disallowing this hearsay testimony during the penalty phase of his capital murder trial violated the Eighth and Fourteenth Amendments. Atkins asserts that Lyons' testimony about his statement was "mitigating" because it tended to show that he had accepted responsibility for his role in the crime. Certiorari, however, should not be granted for at least two reasons: no matter how Atkins dresses up his claim, it presents only a mere state law evidentiary question and the claim is without merit.

A. State law issue

Despite Atkins' efforts to dress his evidentiary claim in a cloak of constitutional

dimension, at bottom the claim is purely one of state law.[1] This Court has, on numerous occasions held that evidentiary matters and rulings are purely matters of state law. See Romano v. Oklahoma, 512 U.S. 1, 11 (1994) (the Eighth Amendment does not establish a "federal code of evidence" binding on the states in a capital sentencing proceeding). See also Spencer v. Texas, 385 U.S. 554, 563-564 (1967) ("Due Process Clause guarantees the fundamental elements of fairness in a criminal trial"...[federal courts] are not a "rule-making organ for the promulgation of state rules of criminal procedure."); Delaware v. Van Arsdall, 475 U.S. 673, 679 (1986) (the Constitution leaves to judges..."wide latitude" to exclude evidence that is "repetitive..., only marginally relevant" or poses an undue risk of "harassment, prejudice, [or] confusion of the issues") and Chambers v. Mississippi, 410 U.S. 284, 306 (1973) (states accorded respect "in the establishment and implementation of their own criminal trial rules and procedures").

This straightforward state law evidentiary question presents no compelling reason to grant certiorari. See Herb v. Pitcairn, 324 U.S. 117, 125-126 (1945); Michigan v. Long, 463 U.S. 1032, 1041 (1983).

[1] Generally, in Virginia, a defendant may introduce his own prior consistent statement only when the prosecution suggests that the defendant has a motive to falsify, alleges that the defendant's testimony is a recent falsification, or attempts to impeach the defendant with a prior inconsistent statement. See Maretta v. Commonwealth, 231 Va. 128, 128 n.3, 340 S.E.2d 828, 831 n.3 (1986). None of these situations had occurred at the time Lyons testified. See also Charles E. Friend, The Law of Evidence in Virginia, § 18-4, 102 (4th ed. 1993) (When offered by the defendant, his out-of-court declarations are not subject to cross-examination by the prosecution. Therefore, such statements are appropriately inadmissible unless offered, not to prove the truth of their content, but to prove only that the defendant spoke consistently with his present testimony, the credibility of which is being challenged.) None of these situations existed when Atkins attempted to introduce his statement through the testimony of Officer Lyons.

B. No Merit

As Atkins recognizes, this Court never has held that states give up wholesale their sovereign prerogative to regulate the presentation of evidence in the sentencing phase of a capital trial. (Atkins' Pet. at 9-10). Rather, this Court has recognized that, to satisfy the Eighth Amendment, a state's evidentiary rules cannot per se preclude the admission of mitigating evidence at a capital trial when the evidence could not be presented through non-hearsay testimony and when "substantial reasons exist to assume its reliability." Green v. Georgia, 442 U.S. 95, 97 (1979) (per curiam).

Consistent with Green, there was no such per se bar in Atkins' case. Atkins could have taken the stand himself and told the jury that he had abducted and robbed Nesbitt and that he told this to police when he was questioned prior to trial.

Atkins asserts that this Court should ignore the undeniable fact that he could have introduced his purported mitigation evidence if he simply had testified in his own behalf. Atkins speculates, and asks this Court to adopt his speculation as a fact, that the trial court would not have permitted him to testify because it had imposed an "across-the-board prohibition" on any inquiry into, comment upon or argument about a factual issue relative to his guilt. (Atkins' Pet. at 12). This simply is not the case. The trial court did rule, consistent with this Court's decision in Franklin v. Lynaugh, 487 U.S. 164 (1988) that it would not permit evidence which was introduced solely to establish "residual doubt" about Atkins' guilt. The trial court, however, never ruled that Atkins was prohibited from testifying in his own behalf and never ruled that, if

Atkins elected to testify, his testimony would be sanitized in any way.[2] The simple fact of the matter is that ***Atkins elected not to testify at sentencing. He never was refused permission to do so on any basis whatsoever.***[3]

In short, the Virginia trial court and Virginia Supreme Court imposed no per se rule excluding Atkins' purported mitigation evidence. Thus, Atkins' federal constitutional claim is without merit.[4]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA,
Respondent herein.

By: _____
Counsel

[2] In fact, the Commonwealth conceded at oral argument in the Virginia Supreme Court that if Atkins had taken the stand at trial the evidence which clearly was inadmissible through Lyons' testimony—Atkins' pretrial statement and the admissions therein—would then have been admissible.

[3] It is highly unlikely that any trial judge in the nation, when faced with a defendant who freely elected to exercise his Fifth Amendment right to testify in his own behalf, would impose an "across the board" prohibition on such testimony.

[4] Atkins' claim that the Virginia Supreme Court failed to "parse" his statement into component parts and consider separately the admissibility of each part is defaulted. (Atkins' Pet. at 16). Atkins never argued on direct appeal that portions of his statement were admissible through Lyons' testimony while other parts were not. It was an "all-or-nothing" proposition for Atkins. That is, Atkins argued only that the entire statement should have been admitted during Lyons' testimony. (See Atkins resentencing brief, attached hereto).

Mark L. Earley
Attorney General of Virginia

Pamela A. Rumpz
Assistant Attorney General
Counsel of Record

Office of the Attorney General
900 East Main Street
Richmond, Virginia 23219
(804) 786-4624

No. 00-8452

IN THE
SUPREME COURT OF THE UNITED STATES

DARYL RENARD ATKINS,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Petition for a Writ of Certiorari to the
Supreme Court of Virginia

RESPONDENT'S CERTIFICATE OF SERVICE

I am counsel for the respondent in the captioned matter and a member of the Bar of the Supreme Court of the United States. On March 8, 2001, the Respondent's Brief in Opposition was sent by U.S. Mail to the Clerk of this Court and a copy of the same was mailed to Robert E. Lee, Jr., Esquire, Virginia Capital Representation Resource Center, Third Floor, 2421 Ivy Road, Charlottesville, Virginia 22903, counsel for petitioner.

Pamela Rumpz

Pamela A. Rumpz
Assistant Attorney General

RECEIVED
MAR 12 2001
OFFICE OF THE CLERK